IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HON'BLE THE CHIEF JUSTICE MR.H.L.DATTU
&
THE HONOURABLE MR. JUSTICE K.T.SANKARAN

TUESDAY, THE 14TH AUGUST 2007 / 23RD SRAVANA 1929

WA.No. 2014 of 2007()

AGAINST THE JUDGEMENT IN WPC.20513/2007 Dated 06/07/2007

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APPELLANT: PETITIONER:

M/S.DYNA ENTERPRISES, B-101,
NAGARJUNA APARTMENTS, MAYUR KUNJ, DELHI-110 096,
REPRESENTED BY ITS PROPRIETOR.

BY ADV. SRI.C.P.MOHAMMED NIAS

RESPONDENTS: RESPONDENTS:

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1. COMMISSIONER OF CUSTOMS, OFFICE OF THE
COMMISSIONER OF CUSTOMS, CUSTOM HOUSE, COCHIN.

2. CUSTOMS EXCISE SERVICE TAX
APPELLATE TRIBUNAL, (SOUTH ZONAL BENCH),
BANGALORE.

BY ASSISTANT SOLICITOR GENERAL SRI.P.PARAMESWARAN NAIR.

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 14/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

H.L.DATTU, C.J. & K.T.SANKARAN, J.

W.A. No. 2014 of 2007

Dated this the 14th day of August, 2007.

J U D G M E N T

H.L.Dattu, C.J.

The writ appeal is directed against the orders passed by the learned Single Judge in W.P.(C).No.20513 of 2007 dated 6th July, 2007. By the impugned order, the learned Single Judge has modified the orders passed by the Customs, Excise & Service Tax Appellate Tribunal, Bangalore Bench.

(2). The matter arises under the provisions of the Customs Act. The case is posted for admission today, but by consent of the learned counsel for the parties to the lis, it is taken up for final hearing.

(3). The appellant, being aggrieved by the orders passed by the assessing authority, inter alia, directing it to pay anti-dumping duty of Rs.29,38,75.442, had preferred first appeal before the first appellate authority under the provisions of the Customs Tariff Act. The appeal came to be rejected by the first appellate authority.

(4). Against the said order, the appellant had filed second appeal before the Customs, Excise & Service Tax Appellate Tribunal (Tribunal for short). Along with the appeal, the appellant had also filed an application for waiver of pre-deposit, for maintaining the appeal.

(5). The said application is rejected by the Tribunal by its order dated 9th April, 2007. Aggrieved by the said order, the appellant was before this court in W.P.(C). No.20513 of 2007.

(6). The learned Single Judge, by order dated 6th July, 2007 has disposed of the writ petition and in that order he has modified the orders passed by the

tribunal. The operative portion of the orders passed by the learned Single Judge reads as follows:

> *"Accordingly, in lieu of the direction given in Ext.P4, it is ordered that the appeal shall be heard and disposed of without insisting for pre-deposit, provided the petitioner furnishes bank guarantee to the first respondent for the amount due, within one month from today."*

(7). Aggrieved by the orders so passed by the learned Single Judge, the petitioner in the writ petition has presented this writ appeal.

(8). The learned Single Judge though has come to the conclusion that the appellant has made out a prima facie case, yet thought it fit to put the appellant on terms by directing it to furnish bank guarantee for the entire amount demanded by the assessing authority as anti-dumping duty.

(9). The learned counsel appearing for the appellant at the time of hearing of this writ appeal would bring to our notice the judgment of the Apex Court in the case of **Mehsana Dist. Co-op Milk P.U.Ltd. Vs. Union of India {2003 (154) E.LT.347 (SC).}** In the said decision, the Apex Court has stated as follows:

> *"The issue here relates to the order passed by the Commissioner (Appeals), Central Excise and Customs, under Section 35F of the Central Excise Act, 1944. By the impugned order, the appellants have been directed to deposit an amount of Rs.30 lakhs by way of pre-deposit. The reasoning given in support of such order is wholly unsatisfactory. The appellate authority has not at all considered the prima facie merits and has concentrated upon the prima facie balance of convenience in the case. The Appellate Authority should have addressed its mind to the prima facie merits of the appellants' case and upon being satisfied of the same determined the quantum of deposit*

> *taking into consideration the financial hardship and other such relevant factors.*
>
> *We, accordingly set aside the decision of the High Court as well as the impugned order dated 14-8-2002 and remand the matter back to the appellate authority for redetermining the issue under Section 35F of the Act after affording an opportunity of hearing to the parties."*

(10). In view of the above observation made by the Apex Court, in our opinion, the learned Single Judge may not be justified in directing the appellant to furnish the bank guarantee, having come to the conclusion that the appellant has made out a prima facie case for waiver of pre-deposit for maintaining the appeal, before the Tribunal. However, the learned counsel appearing for the appellant in order to prove his bona fides would submit that the appellant is ready and willing to deposit a sum of Rs.60 lakhs (Rupees sixty lakhs) within four weeks from today and further requests this court to direct the Tribunal to accept the deposit and dispose of Customs Appeal No.375 of 2006 filed by the appellant

(11). A memo of undertaking of the appellant is also filed before us. The said memo is recharged as under.

> *"I am the appellant in the above appeal. I undertake to pay the amount of Rs.60,00,000/-. The said amount of Rs.60,00,000/- will be deposited within a period of four weeks from today. I also state that the deposit is being made without prejudice to all our rights, claims and contentions."*

(12). In view of the above, we modify the order passed by the learned Single Judge. Accordingly, the following.

ORDER

(i). The writ appeal is disposed of.

(ii). The appellant shall deposit a sum of Rs.60 lakhs (Rupees sixty lakhs only) within four weeks from today, before the tribunal. If such deposit is made within the time granted by this court, we request the Tribunal to hear the appeal, on merits.

(iii). We are informed that the appeal is posted for hearing on 20th September, 2007. Liberty is granted to the appellant to mention before the Tribunal about the orders passed by this court granting time to the appellant to make pre-deposit of Rs.60 lakhs.

(iv). The orders passed by us shall not be treated as a precedent in any other case.

Ordered accordingly.

(H.L.DATTU)
CHIEF JUSTICE

(K.T.SANKARAN)
JUDGE

MS